Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. .....

LEWIS S. TOLLETT, Warden,
Tennessee State Prison for Men
Nashville, Tennessee,

Petitioner,

v.

WILLIE LEE HENDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONSE NOT PRINTED

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Lewis S. Tollett, Warden, Tennessee State Prison for Men, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 20, 1972.

OPINION BELOW

The opinion of the Sixth Circuit, ... F.2d ..., not yet reported, is reproduced as Appendix A. The order of

the District Court of April 12, 1971, granting the relief sought, is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 20, 1972. This petition for certiorari is timely filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

1. Did Mr. Henderson waive his rights to attack the racial composition of the grand jury which indicted him, by his failure and the failure of his retained counsel to object to the composition of the grand jury prior to entering a plea to the indictment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

> §2241. Power to grant writ
>
> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district

courts and any circuit judge within their respective jurisdiction ....

"(c) The writ of habeas corpus shall not extend to a prisoner unless —

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States ..."

STATEMENT OF THE CASE

On January 22, 1948, a Nashville, Tennessee, liquor store employee was shot and seriously wounded in an abortive hold-up attempt. Police arrested the petitioner, Willie Lee Henderson, a Negro, and two other men in connection with the crime. The three were charged with robbery and attempted murder. When the hold-up victim died several weeks later, first degree murder indictments were handed up against all three men by the Davidson County Grand Jury.

Mr. Henderson signed a confession acknowledging his participation in the robbery attempt and the shooting. Mr. Henderson was represented by retained counsel and pursuant to a plea bargain arranged by his attorney, Mr. Henderson entered a plea of guilty and was sentenced to a ninety-nine (99) year prison term. He was still serving that sentence at the time he sought federal habeas corpus relief.

Neither Henderson nor his counsel objected to the exclusion of Negroes from the Grand Jury which indicted him. Although Henderson sought habeas corpus relief in state and federal courts in 1964, he did not raise the systematic exclusion question at that time. Mr. Henderson filed a petition for habeas corpus relief in the state court in 1967, which was denied without a hearing. Upon

review of that decision, the Tennessee Supreme Court ordered that an evidentiary hearing be held on the issue of systematic exclusion of blacks from the grand jury. On remand, the Trial Court found that no pattern of systematic exclusion had been shown and again denied Mr. Henderson any relief. The Tennessee Court of Criminal Appeals affirmed by a divided vote based on what it found to be a waiver created by Mr. Henderson's failure to raise the claim of systematic exclusion before pleading to the indictment and by his plea of guilty itself. The Tennessee Supreme Court declined to review the decision.

Mr. Henderson, having exhausted his state remedies on the question, then sought federal habeas corpus relief in the District Court. His petition raised several grounds but the District Court properly considered only the matter of systematic exclusion of Negroes from the Davidson County Grand Jury. The District Court concluded that a pattern of systematic exclusion of Negroes from the Davidson County Grand Jury in 1948 had, in fact, been shown. It was also held that the petitioner had not waived his right to challenge the indictment handed up by such grand jury. Accordingly the District Court ordered petitioner's release. The United States Court of Appeals for the Sixth Circuit affirmed that decision.

REASON FOR GRANTING THE WRIT

May a black defendant who in 1948, with retained counsel, entered a plea of guilty to first degree murder, challenge the composition of the Grand Jury in 1971, or did he waive his right by failure to file a plea in abatement before entering a plea and thereafter entering a plea of guilty to the charge?

The Tennessee Courts have held that unless the defendant objects by a motion or plea in abatement to the venire before he pleads to the indictment, he cannot thereafter avail himself of the claim that the venire was improperly composed. See *State ex rel Lawrence v. Henderson*, 433 S.W.2d 96, 101 (Tenn. Ct. of Crim. App. 1968) in cases cited therein; see also *State v. Cole*, 28 Tenn. 626; *McPigue v. State*, 63 Tenn. 313; *Turner v. State*, 89 Tenn. 547, 15 S.W. 838; *Ellis v. State*, 92 Tenn. 85, 20 S.W. 500.

Federal Rule of Criminal Procedure, Rule 12 (b) (2) and the notes of the Advisory Committee on Rules apparently reach the same results in the Federal Courts. Those notes are as follows:

"Note to Subdivision (b) (1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rule of Civil Procedure.)

"In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure.) Among the defenses and objections in this group are the following: illegal selection or organization of the grand jury, disqualifi-

cation of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc."

The Sixth Circuit Court of Appeals admits that the rule in Tennessee is as stated and that the federal rule is as stated. That Court further admits that the rule in the Sixth Circuit is as elsewhere, that a voluntary plea of guilty made by an accused while represented by competent counsel waives all non-jurisdictional defects and that the racial composition of a grand jury is non-jurisdiction in nature and subject to waiver. *Michener v. U. S.*, 170 F.2d 973 (8th Cir. 1948); *Hunt v. State of Georgia*, 445 F.2d 1228 (5th Cir. 1971); cf. *Colson v. Smith*, 438 F.2d 1075 (5th Cir. 1971).

This Court in *Parker v. North Carolina*, 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458, in considering the question raised here stated as follows:

"We also have before us the question whether the indictment to which Parker pleaded is invalid because members of his race were allegedly systematically excluded from the grand jury which returned the indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the grand jury must be raised by motion to quash the indictment prior to the entry of the guilty plea. Because Parker had failed

to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. See *Fay v. Noia*, 372 U.S. 391, 428-429, 9 L. Ed. 2d 837, 862, 863, 83 S. Ct. 822 (1963). We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief. *Ibid.* Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide."

The Honorable Frank Gray, Jr., United States District Judge, in his opinion seemed to rely heavily on the statement of the Honorable Charles Galbreath, Judge of the Court of Criminal Appeals of Tennessee, wherein he stated that, "[n]o lawyer in this state would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948 . . ." *State ex rel Henderson v. Russell*, 459 S.W.2d 176, 179 (Tenn. Ct. of Crim. App. 1970). The Sixth Circuit Court of Appeals also tended to give much weight to this statement in their opinion also. The facts do not support this statement. As this Court is well aware, *Strauder v. West Virginia*, 100 U.S. 303 (1880) and *Patton v. Mississippi*, 332 U.S. 463 (1947) had been decided by this Court but in addition, there was a highly publicized case heard by the Supreme Court in Nashville at the December Term of 1946 (*Kennedy v. State*, 186 Tenn. 310) wherein Mr. Justice Thurgood Marshall and others challenged the racial composition of the grand and petit juries in a case arising out of Maury County, Tennessee, at Columbia. Certiorari was denied by the United States Supreme Court and this opinion was designated for publication April 15, 1948.

Mr. Henderson also seems to rely heavily on the case of *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, wherein the petitioner there was alleged to have waived his constitutional right to counsel. The Court in that case said that the petitioner made the decision alone apparently without sufficient knowledge of the consequences of his waiver. There is a considerable difference in a man waiving counsel and a man who has retained counsel waiving another right which he may have as in this case to attack the composition of the grand jury.

CONCLUSION

The Sixth Circuit in this case held that, "Under the unique circumstances of this case we cannot find that his plea of guilty waived his right to challenge the grand jury selection process by means of federal habeas corpus," and in a sense seemed to say that even though Tennessee correctly applied their own law and that this is not contrary to the federal rules, that these circumstances warrant a new trial on behalf of Mr. Henderson.

If the circumstances in this case are unique enough for a new trial, what happens in a situation where a black defendant had Court-appointed counsel and entered a plea of not guilty in a Davidson County, Tennessee, case prior to 1955 or '60. Surely there could be no clear waiver presented and if this was not a case where Mr. Henderson waived his right to now attack the composition of the grand jury, then it is the opinion of this attorney that there is no black inmate in the prisons of Tennessee who was convicted in Davidson County prior to 1960 who would not deserve a new trial. Needless to say, this would create an unbearable situation in the criminal courts of this county.

The question presented is of sufficient importance for the Court to exercise its jurisdiction and issue a writ of certiorari to review the opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

[fol. 1] NO. 71-1451

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

WILLIE LEE HENDERSON,
Petitioner-Appellee,

v.

LEWIS S. TOLLETT, Warden,
Respondent-Appellant.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed April 20, 1972.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

CELEBREZZE, Circuit Judge. This is an appeal from a decision of the United States District Court for the Middle District of Tennessee, granting a petition for habeas corpus.

On January 22, 1948 a Nashville, Tenn. liquor store employee was shot and seriously wounded in an abortive hold-up attempt. Police arrested Petitioner, Willie Lee Henderson, a Negro and two other men, in connection with the crime. Three were charged with robbery and attempted murder. When the hold-up victim died several

weeks later, first degree murder indictments were handed up against all three men by the Davidson County Grand Jury.

Without seeking the advice of counsel on this matter, Petitioner signed a confession acknowledging his participation in the robbery attempt and the shooting. Although he initially wanted to plead not guilty Henderson was eventually persuaded by counsel retained by his mother, to [fol. 2] enter a guilty plea. He did so in March, 1948 and was sentenced to a ninety-nine year prison term pursuant to a plea bargain arranged by his attorney. He was still serving that sentence at the time he sought federal habeas corpus relief.

Neither Henderson nor his counsel objected to the exclusion of Negroes from the Grand Jury which indicted Petitioner. Although Henderson sought habeas corpus relief in state and federal courts in 1964 he did not raise the systematic exclusion question at that time.[1] Such claim was included in a 1967 state habeas corpus petition which was denied by the state trial court without a hearing. Upon review of that decision the Tennessee Supreme Court ordered that an evidentiary hearing be held on the issue.

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[1] In those earlier pro se petitions he did claim that his confession had been coerced and that his plea of guilty was therefore involuntary. He also asserted that he had been denied the assistance of counsel. The District Court considered these claims and decided them adversely to the Petitioner on the merits. We affirmed. Henderson v. Henderson, 6th Cir. #17855 (1968), cert. denied 391 U.S. 927 (1968).

We note that although the involuntary plea and ineffective assistance of counsel claims would have relevance to this case they have not properly been raised by Petitioner in connection with his present application for relief. We note, too, that were these claims properly before us we could find them unavailable to support a finding in Petitioner's favor in light of the prior adverse adjudication. See Sanders v. United States, 373 U.S. 1, 15 (1963); 28 U.S.C. § 2244. The present posture of the case does not require us to rule on the matter of preclusion, however.

On remand the trial court found that no pattern of systematic exclusion had been shown and again denied Petitioner any relief. The Tennessee Court of Criminal Appeals affirmed by a divided vote. It based its decision entirely on what it found to be the waiver created by Petitioner's failure to raise the claim of systematic exclusion before pleading to the indictment and by his plea of guilty itself. The Tennessee Supreme Court declined to review the decision.

Henderson, having exhausted his state remedies on the question then sought federal habeas corpus relief in the District Court. His petition raised several grounds for relief, but the District Court properly considered only the matter of systematic exclusion of Negroes [fol. 3] from the Davidson County Grand Jury. It reviewed the testimony offered at the state evidentiary hearing and concluded that a pattern of systematic exclusion of Negroes from the Davidson County Grand Jury in 1948 had, in fact, been shown. It was also held that Petitioner had not waived his right to challenge the indictment handed up by such a grand jury. Accordingly, the District Court ordered Petitioner's release. This appeal followed.

For nearly a century it has been plain that "a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury ... from which members of his race have been excluded because of their race." *Eubanks v. Louisiana*, 356 U.S. 584, 585 (1958); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Patton v. Mississippi*, 332 U.S. 463 (1947). It is plain that the evidence in this case fully supports the District Court's finding that Negroes were systematically excluded from the Davidson County Grand Jury

at the time the indictment against Petitioner was handed up.[2] The Respondent does not contest the finding of impermissible exclusion on appeal; he bases the appeal entirely on the claim that Henderson waived any right to attack the indictment because he did not make his challenge before pleading to the charges and because he pled guilty to the indictment.

Tennessee courts have consistently ruled that a challenge to the composition of the grand jury venire
[fol. 4] must be made by motion or plea in abatement before any plea to the indictment is entered. Failure to make such a challenge waives any objection under Tennessee law. *See State ex rel Lawrence v. Henderson*, 433 S.W.2d 96, 101 (Tenn. Ct. Crim. App., 1968) and cases cited therein.

A "state court's finding of waiver" does not, however "bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question." *Fay v. Noia*, 372 U.S. 391, 439 (1963). In making that independent determination the federal courts must apply the "classic" definition of waiver: Did the defendant's conduct amount to "an intentional relinquishment or abandonment of a known right or privilege."

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[2] The evidence showed that no Negro had served on the Davidson County Grand Jury in the years prior to 1948 and that no Negro was to serve on that panel until 1953, when a single Negro was called to duty: this despite the fact that Negroes made up over 25% of Davidson County's population. An explanation for this startling disparity may be found in the evidence. Proof at the hearing showed that whenever a Negro citizen's name appeared in the venire list from which grand jurors were selected by the county judges, a "c" or "col" abbreviation was placed before his name; officials were thus provided with a simple means of determining which citizens might be appropriately "excused" from grand jury duty. It is apparent from the absence of any Negroes on the grand jury panels that the means were used and the impermissible end of exclusion accomplished.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *Fay v. Noia*, 372 U.S. 391, 439.

Respondent initially suggests that it is inappropriate to apply the "classic" definition here, apparently because he does not believe that the equal protection right in question warrants the scrupulous protection which the classic definition and the accompanying "presumption against waiver" would provide. *See Johnson v. Zerbst, supra*, 304 U.S. at 464.

Nothing in *Fay v. Noia* suggests that the Supreme Court intended to establish a hierachy of constitutional protections and limit the applicability of the classic definition of waiver to those rights occupying the highest positions. The decision speaks only of "waivers affecting federal rights," *Fay v. Noia, supra*, 373 U.S. at 439; it does not distinguish among those rights. Since that decision was handed down three Circuit Courts have been asked to decide whether a particular habeas petitioner's conduct constituted a waiver of his equal protection right to indictment by a grand jury from which members of his race have not been systematically excluded. Each Circuit has applied the *Johnson v. Zerbst* standard in answering that question. *McNeil v. State of North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964); *Wade v. Yeager*, 377 F.2d 841, 846 (3rd Cir. 1967) *cert. den.* 393 U.S. 893 (1968).[3] We see no justification whatever for applying a less rigorous standard here.

[3] In the years prior to the Supreme Court's decision in Fay v. Noia, both the Fourth and Fifth Circuits had apparently employed a test somewhat less rigorous than that of Johnson v. Zerbst, in determining whether or not a habeas petitioner had waived his right to challenge the grand jury selection process. See United States v. Brady, 133 F.2d 476 (4th Cir. 1943), cert.

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When the *Johnson v. Zerbst* standard is applied it becomes clear that Petitioner's failure to raise an objection to the grand jury selection process could not have been an intentional abandonment of a known right. Petitioner was himself unaware that he had any such right at the time of his plea. Given the fact that he was then twenty years old, had received less than a sixth grade education and was not informed of such right by counsel this lack of knowledge is hardly surprising. Waiver, if it is to be found here would have to be predicated upon the knowledge and conduct of Petitioner's retained counsel.

While *Fay v. Noia, supra*, indicated that "a choice made by counsel not participated in by the petitioner does not automatically bar relief," 372 U.S. at 439, that decision does not require that the criminal defendant be consulted in every situation before a valid waiver can be effected. Certainly such consultation would be useless where, as here, the Petitioner's "frame of reference could not have included any comprehension of the traditional constitutional rights incident to a fair trial." *Whitus v. Balkcom*, 333 F.2d 496, 503 (5th Cir. 1964), cert. den. 379 U.S. 931 (1964).

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den. 319 U.S. 746 (1943); United States v. Harpole, 263 F.2d 71 (5th Cir. 1959) cert. den. 361 U.S. 838 (1959). The Fourth Circuit explicitly recognized that Fay v. Noia required a stricter definition of waiver in McNeil v. State of North Carolina, 368 F.2d at 316. The Fifth Circuit has implicitly reached the same result in its post Fay v. Noia cases, such as Cobb v. Balkcom, 339 F.2d 95 and Colson v. Smith, 438 F.2d 1038 (1971). See also, the discussion of the application of the Johnson v. Zerbst rule to grand jury challenges in the Fifth Circuit contained in Gordon v. Breazeale, 246 F. Supp. 2, 7 (N.D. Miss. 1965).

If the conduct of counsel is, by itself, to waive a constitutional right held by the defendant, however, it would seem that at a minimum counsel's actions should [fol. 6] involve "a deliberate choice of strategy" amounting to an intentional "bypassing" of state procedures. *Henry v. Mississippi*, 379 U.S. 443, 451 (1965); *Fay v. Noia*, *supra*, 372 U.S. at 438.

Any discussion of tactical calculation is clearly inappropriate here. Petitioner's counsel testified at the evidentiary hearing that he never thought of the "possibility" of objecting to the systematic exclusion of Negroes from the Davidson County Grand Jury. Judge Galbreath, concurring in the decision of the Tennessee Court of Criminal Appeals denying Petitioner relief, felt compelled to comment: "No lawyer in this state would ever have thought of objecting to the fact that Negroes did not serve on the grand jury in Tennessee in 1948." *State ex rel Henderson v. Russell*, 459 S.W.2d 176, 179 (Tenn. Ct. Crim. App. 1970). This statement from a Tennessee Appellate Judge makes all the more credible the claim that Petitioner's attorney was without knowledge of the right to challenge the indictment when he advised his client to plead to the charges without objection to the grand jury venire.

When neither attorney nor client have any knowledge whatever of the right assertedly waived, it is clear that the *Johnson v. Zerbst* standard for waiver has not been met. Such is the case here. Accordingly we hold that Petitioner's failure to object to the indictment returned by an all-white grand jury before entering a plea did not waive his right to challenge the composition of that grand jury in subsequent federal habeas proceedings.

It is suggested, however, that apart from the mere failure to challenge the grand jury composition Petitioner

also acted to affirmatively waive his right to make such challenge by pleading guilty to the indictment.

It is the rule in this Circuit, as elsewhere, that a voluntary plea of guilty made by an accused while represented by competent counsel, waives all non-jurisdictional[4] defects. *Austin v. Perini*, 434 F.2d 752 (6th Cir. 1970); *Reed v. Henderson*, 385 F.2d 995 (6th Cir. 1967); *Crockett v. Haskins*, 372 F.2d 475 (6th Cir. 1966); *Caldwell v. Maxwell*, 357 F.2d 646 (6th Cir. 1966);

[fol. 7]

But while there is merit to the general rule that a guilty plea in a state court waives a defendant's right to raise in the federal courts alleged nonjurisdictional defects, we must be wary of blindly applying this doctrine to every case involving such a plea. There is nothing inherent in the nature of a plea of guilty which ipso facto renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily

4 While the failure of an indictment to state an offense has been held jurisdictional, other defects in the grand jury process are non-jurisdictional in nature and subject to waiver. Michenel v. United States, 170 F.2d 973 (8th Cir. 1948). The Fifth Circuit has implicitly held that the precise sort of challenge undertaken in the present case deals with a non-jurisdictional defect since it has held the right waived by a guilty plea in a situation where the presumption of intentional abandonment (see text above) was apparently appropriate. See Hunt v. State of Georgia, 445 F.2d 1228 (5th Cir. 1971); cf. Colson v. Smith, 438 F.2d 1075 (5th Cir. 1971).

Similarly we do not believe that the effect of a guilty plea can be totally avoided in this case by calling the indictment here void rather than voidable. The Tennessee cases cited by the District Court do not seem to support this proposition, one which the Tennessee Court of Criminal Appeals necessarily rejected in affirming the denial of state habeas corpus relief to Petitioner. Declaring void any indictment prepared by an improperly constituted grand jury would, in any event, result in a dislocation of the criminal process entirely out of keeping with the harm done in the great majority of cases where a flaw far less dangerous to the integrity of the criminal process than racial exclusion has been found.

such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures; therefore, principles of comity and the interests of orderly federal-state relations require that he not be allowed to present these claims to the federal courts. *United States ex rel Rogers v. Warden of Attica State Prison*, 381 F.2d 209, 213 (2d Cir. 1967).

The rule set out in *Austin v. Perini*, *supra*, and innumerable other cases simply recognizes the fact that a voluntary guilty plea, entered upon the advice of competent counsel usually implies an intentional and knowing abandonment of rights. *United States v. Warden of Attica State Prison*, *supra*, (cf. the position of
[fol. 8] Wisdom, J. In *United States v. Lucia*, 423 F.2d 697 (5th Cir. en banc 1970) *cert. den.* 402 U.S. 943 (1971) reaffirming his own belief in the principles announced by him in an earlier disposition of that case, 416 F.2d 920, 923 (5th Cir. 1969)). This presumption should not be lightly set aside; but in those few situations where evidence suggests that the presumption is unreliable an inquiry must be made into all the underlying circumstances surrounding the asserted waiver.[5] Our own doubt that a

[5] Such flexibility is not barred by the Supreme Court's recent decisions in **Brady v. United States**, 397 U.S. 742 (1970); **McMann v. Richardson**, 397 U.S. 749 (1970), or **Parker v. North Carolina**, 397 U.S. 790 (1970) (cf. **North Carolina v. Alford**, 400 U.S. 25 (1970); **Austin v. Perini**, 434 F.2d 752 (6th Cir. 1970)). In those cases the Court considered whether inaccurate legal advice as to the admissibility of confessions and the constitutionality of a particular penalty scheme supplied sufficient evidence of involuntariness or unintelligence as to render invalid a defendant's plea of guilty. The Court decided that such evidence alone was insufficient to invalidate the plea, where the advice given by counsel "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. at 771.

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Negro defendant would know of his right to challenge a racially exclusive grand jury selection process in the Tennessee of 1948, together with the suggestion of Judge Galbreath that members of the Bar would have been equally unaware of the right suggests that this is one of those rare cases where the value of the guilty plea as pre-
[fol. 9] sumptive evidence of waiver is minimal. The testimony of Petitioner's counsel as to his own unawareness of the right to challenge the grand jury selection process convinces us that the presumption bore no relation whatever to reality in this unusual situation. Courts have consistently recognized that where both petitioner and counsel are without knowledge[6] of a substantial

(Continued from preceding page)

That line of cases did not establish a new general test for examining conduct alleged to constitute a waiver of federal rights; in fact it reemphasized the importance of Johnson v. Zerbst, 304 U. S. 458, 464 (1938), as the governing authority on the subject. See Brady v. United States, 397 U. S. at 748 n. 6. It did not suggest that a valid guilty plea waived the right to challenge all pre-pleading defects when a defendant neither knew nor could have known of the right at the time he entered his plea. It did not deal with a situation in which counsel's advice was competent judged by the time and place at which it was given, but grossly inadequate in light of the clearly established constitutional law of the period.

The Brady line of cases dealt only with challenges to the guilty plea itself; no such challenge has been made here. For this reason alone we believe that Brady and its successors cannot govern our decision here. Given the uniqueness of the concerns which necessarily affect any evaluation of the validity of a guilty plea in our system (see Brady, 397 U. S. at 749-59; McMann, 397 U. S. at 774) the Brady line of cases cannot provide a useful model for the practical application of the Johnson v. Zerbst standards in general. See the excellent discussion of this point in United States v. Liguori, 430 F. 2d 842 (2d Cir. 1970); cf. Scogin v. United States, 446 F. 2d 416 (8th Cir. 1971); Bannister v. United States, 446 F. 2d 1250 (3d Cir. 1971).

[6] Conceivably the lack of knowledge here might be traced to incompetent counsel. Were we to so hold there would be no need to discard the presumptive value of the guilty plea since one of the conditions precedent to the creation of such presumption would not have been satisfied. Holding that Petitioner received ineffective assistance of counsel would be a diffi-

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constitutional right that right is not waived even by a guilty plea. *See United States v. Michael,*[7] 426 F.2d 1066 (7th Cir. 1970); *Scogin v. United States*, 446 F.2d 416 (8th Cir. 1971); *Bannister v. United States*, 446 F.2d 1250 (3d Cir. 1971); *United States v. Liguori*, 430 F.2d 842 (2d Cir. 1970) *cert. den.* 402 U.S. 990 (1971)). In each of the cases just cited defendants sought to raise [fol. 10) a right granted to persons in their situations by a decision of the Supreme Court handed down after they had entered guilty pleas to criminal charges. In each case the Court of Appeals involved held that a petitioner could not have knowingly relinquished a right of whose existence he was unaware at the time he was asked to plead. The Courts accordingly refused to find that any waiver had occurred despite the guilty pleas.

(Continued from preceding page)

cult thing to do here, however, even were we completely free to do so (see n. 1 *supra*). It seems evident that Petitioner received the same advice on this point that he would have received from most other lawyers in Tennessee in 1948. The Fifth Circuit has held an attorney's failure to inform his client of the right to challenge an improperly selected grand jury to constitute ineffective assistance of counsel, **Windom v. Cook**, 423 F.2d 721 (5th Cir. 1970), but that decision apparently dealt with a more recent time when raising such a claim might be more clearly a part of counsel's duty even in the Southern states. We are not sure that a finding of ineffective assistance of counsel would be appropriate here, even were it clear that that issue was properly before us.

Whether Petitioner's lack of knowledge on the matter of the invalidity of the grand jury selection process resulted from incompetent counsel or simply from a too-long tolerated gap between the requirements of the Constitution and realities of Tennessee Criminal practice the result was the same: Petitioner was denied an opportunity to raise a claim which might effectively have barred his prosecution.

[7] In **United States v. Michael**, the Court of Appeals for the Seventh Circuit, in dealing with a waiver allegedly created by petitioner's failure to raise a self-incrimination defense unknown to him at the time he entered a guilty plea stated:

> [Petitioner's] failure to assert a defense unknown to him at the time he pleaded guilty was not such an "intentional relinquishment or abandonment of a known right or privilege" as to overcome the presumption against waiver of fundamental Constitutional rights. 426 F.2d 1067, 1069 (1970).

While we cannot term the right here a "new" one—to do so would ignore a line of cases stretching back to 1880—it is clear that the present Petitioner was as effectively and excusably ignorant of the right as if it had never been announced. Under the unique circumstances of this case we cannot find that his plea of guilty waived his right to challenge the grand jury selection process by means of federal habeas corpus. *See also Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970); *Ellzey v. Breazeale*, 277 F. Supp. 948 (S.D. Miss. 1967); *Gordon v. Breazeale*, 246 F. Supp. 2 (N.D. Miss. 1965).

Accordingly we affirm the District Court's decision ordering Petitioner's release. The State of course may seek re-indictment of Petitioner by a properly constituted grand jury. Such grand jury proceedings and the resulting trial, if any, should be commenced within a reasonable period after the entry of this judgment or other final determination of this matter. In the event of a conviction Petitioner must be credited with the time already served.

Affirmed.

APPENDIX B

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIE LEE HENDERSON

VS.

LEWIS S. TOLLETT, Warden,
Brushy Mountain State Prison

} Civil No. 5996

ORDER

(Filed April 12, 1971)

This proceeding involves a petition for the writ of habeas corpus. Petitioner is presently confined, in the custody of respondent, at the Brushy Mountain Prison, Petros, Tennessee, where he is serving a sentence of ninety-nine years which was imposed by the Criminal Court of Davidson County, Tennessee, following his plea of guilty, in 1948, to a charge of murder in the first degree. In his *pro se* petition, petitioner sets forth four grounds upon which he bases his claim that his present incarceration is illegal. With regard to the first three of his asserted grounds, petitioner makes no affirmative showing, nor does he otherwise indicate, that he has ever presented them for adjudication to the courts of Tennessee. Since a showing of exhaustion of available state remedies is required by 28 U.S.C. § 2254 before federal habeas corpus relief can issue, this court, by order entered

December 29, 1970, refused to take cognizance of petitioner's first three grounds for relief. As his fourth ground for relief, petitioner asserts that his [fol. 2] present confinement is illegal, because he was indicted by a grand jury from which members of his race (Negro) had been systematically excluded.

With regard to this fourth ground, the petition contains the required showing of exhaustion of available state remedies. Additionally, as was noted by this court in its order of December 29, 1970, this ground raises constitutional issues of considerable magnitude. Accordingly, the aforesaid order directed respondent to show cause why the writ should not issue. The directed response was subsequently forthcoming, and, no satisfactory cause to the contrary appearing therein, it was ordered that the writ issue and that petitioner be brought before this court at an appointed time for a hearing. The hearing was held as ordered, and, as a result thereof, the following have been established as the basic facts of the case.

Petitioner, a black youth, was indicted by the Davidson County Grand Jury in 1948 on a charge of murder in the first degree. Although roughly one fourth of the population of Davidson County in 1948 was composed of members of petitioner's race, no black people served on the grand jury which indicted him; no black people had ever served on a Davidson County Grand Jury prior to the time of his indictment; and no black people served on the Davidson County Grand Jury until well into the next decade following his indictment. What is more, whenever the name of a black citizen appeared on the venire lists from which members of the Davidson County Grand Jury were chosen at the time of petitioner's indictment, it was marked with either the designation "c" or the designation "col" to

signify that the bearer of the name was "colored." Petitioner was represented by counsel who failed [fol. 3] to object to the composition of the indicting grand jury, quite simply, because the possibility never occurred to him. For the same reason, he never apprised petitioner of the possibility of attacking his indictment on that ground, and petitioner himself, a twenty-year-old with less than a sixth grade education, never thought of the possibility on his own. Ultimately, petitioner pleaded guilty (he now claims as the result of coercion and trickery, but that is irrelevant in the present context) and was sentenced to serve a term of ninety-nine years in prison.

After serving some two decades in prison, petitioner collaterally attacked his sentence in a state habeas corpus proceeding on the ground that he had been indicted by a racially-exclusive grand jury. His petition was denied at the trial level without a hearing. Eventually, however, the Supreme Court of Tennessee reversed this denial and ordered that an evidentiary hearing be held on petitioner's allegations. Apparently petitioner was provided with court-appointed counsel who, in effect, elected to begin the proceeding *de novo* by filing a second and somewhat more sophisticated petition, based upon the same ground, in the Criminal Court of Davidson County (No. 4662) on January 12, 1968. A hearing was held on the new petition, and at that hearing all of the facts recited above were adduced. Nevertheless, the trial judge found as a matter of fact that there had been no systematic exclusion of Negroes from the grand jury which had indicted petitioner, and, accordingly, the petition was denied.

Petitioner appealed, and a divided Court of Criminal Appeals of Tennessee, with apparent reluctance, affirmed

the decision of the trial judge. The appellate court did not, however, affirm the trial judge's finding of fact that there had been no systematic exclusion of Negroes from the Davidson County Grand Jury in 1948. Rather, it based its decision on the ground that, regardless of [fol. 4] whether petitioner was correct or not in contending that members of his race had been systematically excluded from the grand jury which had indicted him,[1] he had waived all right to complain of the grand jury's composition, (a) because he had failed to raise that issue by means of the procedural devices available to him at the time of his indictment and conviction, and (b) because his plea of guilty had abrogated any defects which the indictment might have contained. *Henderson v. Russell*, No. 5996 (Ct. Crim. App. Tenn., filed July 6, 1970). This decision by the Court of Criminal Appeals of Tennessee became the final state court ruling in the case upon denial of certiorari by the Supreme Court of Tennessee. Finally, having thus exhausted his available state remedies, petitioner sought federal habeas corpus relief. It remains, then, to consider whether such relief shall be granted.

(I) The constitutional issue: indictment of a black man by a grand jury from which members of his race have been systematically excluded.

The unconstitutionality of racially-exclusive grand juries, insofar as their actions affect members of the excluded race, has been firmly established since at least as early as 1880. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Neither an in-depth analysis of the facts of

[1] The clear implication of the three opinions rendered in the case is that the members of the Court of Criminal Appeals of Tennessee felt that petitioner's contention was correct.

the instant case nor a lengthy citation of authorities is required to support the proposition that petitioner's showing of the total absence of members of his race
[fol. 5] from the Davidson County Grand Jury in 1948 and prior years constitutes proof of a *prima facie* case of systematic exclusion of such persons, thereby casting the burden on respondent to prove to the contrary. *Whitus v. Georgia*, 385 U.S. 545 (1967). This burden respondent clearly has failed to sustain. Moreover, any rebuttal proof which respondent might have offered would have been essentially ineffective in the face of petitioner's showing that the names of black people were given distinguishing marks whenever they appeared in the venire lists from which Davidson County Grand Jurors were chosen at the time of his indictment, for it is obvious that such " ... marking of the jury ... [lists] with the letter "C" [or with the abbreviation "col"] to indicate persons of the Negro race constituted a purposeful discrimination which is unlawful under the Federal Constitution." *Bonds v. State*, 421 S.W.2d 87, 90 (S. Ct. Tenn. 1967). It is thus ineluctable that petitioner was indicted by an unconstitutionally-composed grand jury, and it is also ineluctable that such a body is legally not a grand jury at all.

(II) The waiver issue: effect of petitioner's failure to object, at the time of his indictment or shortly thereafter, to the racial composition of the grand jury which indicted him.

Respondent concedes—as it is apparent he must—that petitioner has proved everything necessary fully to support his contention that members of his race were systematically excluded from the grand jury which indicted him. He thus asserts " ... that the only [remaining] issue is whether

or not the petitioner has waived his rights to question the composition of the [indicting] grand jury ...," and he strenuously insists that petitioner has indeed [fol. 6] waived such rights. This court does not agree.

With all deference to what respondent refers to as a "long line of cases" in Tennessee which appear to hold otherwise, this court feels it is illogical to contend that either petitioner's failure timely to object to the composition of the indicting grand jury or his subsequent entry of a guilty plea constitutes a waiver, by operation of law, of his right to object to the composition of that grand jury at the present time. Such a contention, as pointed out by Judge Oliver in his well-reasoned and convincing dissent in *Henderson v. Russell*, *supra*, rests upon a confusion between an indictment which is merely technically defective and one—such as petitioner's—which is a complete nullity.[2] In the latter case, stated in the simplest of terms, there is no "defect" in the indictment to waive, for there is in fact no "indictment" to contain such a defect: instead, there is merely a sheet of paper, meeting, to be sure, the facial requisites of a valid indictment, but having in actuality no legal effect whatsoever. It is clear that any criminal prosecution brought incident to such an "indictment" is illegal and that a plea of guilty to such an "indictment" is of no binding effect, for such an "indictment" confers no subject-matter jurisdiction on the sentencing court. *State v. Hughes*, 371 S.W.2d 445 (S. Ct. Tenn. 1963); *Robinson v. City of Memphis*, 277 S.W.2d 341 (S. Ct. Tenn. 1955); and cases cited in *Henderson*

[2] Thus, for example, in the case of Bonds v. State, supra, an indictment rendered by a racially-exclusive grand jury in Williamson County " ... dismissed as void" by the Supreme Court of Tennessee (and this despite the fact that, strictly speaking, defendant's challenge to the racial composition of the indicting grand jury was not timely raised).

[fol. 7] *v. Russell*, *supra*, (Oliver, J., dissenting).

Respondent places great store in the fact that a defendant in federal court may, under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, waive the right to complain of the racial composition of the grand jury which indicted him if he fails to raise that issue at a specified stage in the proceeding. Indeed, the crux of his entire position with regard to waiver seems to be the proposition that if unconstitutionality of grand juries may be waived in federal court, then the same rule should apply to state court proceedings. His basic assumption is that, if petitioner had been indicted by a federal grand jury and sentenced by a federal judge, then he would now be precluded from objecting to the racial composition of the indicting grand jury. From this premise, respondent infers that the same result should be effected in the case at bar.

This court is not persuaded by respondent's argument and is of the opinion that it fails for at least three reasons: (1) his basic assumption is factually incorrect; (2) even if his basic assumption were true, a waiver under Rule 12 is not analogous, in terms of what is actually waived, to the waiver assertedly made by the instant petitioner; and (3) ignoring completely (1) and (2), *supra*, the case law is clear as to the test for waiver which this court must apply in the case at bar, and, applying that test, it is inescapable that petitioner has waived nothing. A brief amplification of the foregoing considerations is here in order.

(1) Rule 12(b)(2), Federal Rules of Criminal Procedure, provides that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment ..." must be raised before trial, otherwise they are waived.

[fol. 8] In his brief, respondent sets forth pertinent portions of the Notes of Advisory Committee on Rules to point out that "[i]llegal selection or organization of the grand jury" is one of the defenses or objections thus subject to waiver, and he cites several federal cases which refuse, on grounds of waiver under Rule 12, to permit the challenge of indictment by racially-exclusive grand juries to be raised.

Nevertheless, respondent's brief omits an important consideration, namely, the fact that Rule 12(b)(2) expressly provides that the defense of lack of jurisdiction is not waived by failure to raise it before trial. It is indeed difficult, if not impossible, to conceive how the rule could provide otherwise, for it is axiomatic in Anglo-American jurisprudence that one cannot waive lack of jurisdiction, even if one so wishes. And, as noted above, a void indictment, under the law of Tennessee, confers no subject-matter jurisdiction on the sentencing court. Hence, Rule 12, by its very language, would not necessitate a finding of waiver in the case at bar, even if it were applicable herein.

Further, Rule 12(b)(2) also provides that, in the case of those defenses and objections which are waived if not raised before trial, " ... the court for cause shown may grant relief from the waiver." Respondent has not apprised this court of any reason why a court before which an individual's conviction is attacked collaterally may not likewise grant relief from such waiver, upon a showing of good cause. In the instant case, any number of factors have been established which suffice to constitute such a showing. Thus, if petitioner were held, by operation of law, at some point to have waived his right to challenge the racial composition of the grand jury which indicted

[fol. 9] him, it is readily apparent that this court could appropriately grant relief from such waiver, even if Rule 12(b)(2) actually applied to the case at bar. It is clear from the foregoing considerations that respondent's basic premise is incorrect.

(2) Assuming, *arguendo*, that a waiver under Rule 12 were categorical and would admit of no exceptions, it would still avail respondent nothing to point to the situation in federal court and argue that the same considerations should apply in the case of the instant petitioner, for a waiver under Rule 12 is not analogous to the waiver assertedly made by this petitioner: what this petitioner has assertedly waived cannot be waived under Rule 12.

More specifically, this petitioner is attacking the racial composition of the grand jury which indicted him on the ground that that composition resulted from a selection process which denied him equal protection of the laws. Thus the part of the Constitution upon which the instant petition is based is the Equal Protection Clause of the Fourteenth Amendment, and the right which respondent contends petitioner is now precluded from asserting is the right to equal protection of the laws. The Equal Protection Clause is worded as follows: '[n]o *State* shall ... deny to any person within its jurisdiction the equal protection of the laws," (emphasis added) and it follows from this wording that, whatever may be the standard with which federal grand jury selection must comply, it is not the one set forth in the Equal Protection Clause of the Fourteenth Amendment,[3] for that clause " ... effects

[3] In actual effect, of course, the federal and the state standards are the same. Nevertheless, the rights which give rise to the respective standards are different: if a federal defendant complains of the racial composition of the grand jury which indicted him, he is in fact complaining that his

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[fol. 10] a prohibition only on the states," *Washington v. United States*, 401 F.2d 915, 922 (D.C. Cir. 1968), and is thus inapplicable to the Federal Government, the Federal Judiciary, and the Federal Rules of Criminal Procedure. The sole point which this court wishes to stress in the present context, however, is that, whatever it may be that a federal defendant waives under Rule 12-(b)(2), it is clearly not the right to complain of a denial of equal protection of the laws by virtue of racially-exclusive grand jury selection. It follows that the waiver provision of Rule 12 is necessarily not analogous to the waiver which respondent asserts was made by this petitioner: the practice in federal court has no bearing whatever on the issue presently before this court, and the cases cited by respondent are inapposite in the present context.

(3) Finally, ignoring the foregoing considerations completely, it is readily apparent from the cases that respondent's argument with respect to waiver is not well taken. "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default," *Labat v. Bennett*, 365 F.2d 698, 707 (5th Cir. 1966), certiorari denied 386 [fol. 11] U.S. 991 (1967), and the law is clear that "[a] procedural default, such as the one here in question, may not be regarded as a waiver unless it appears from the evidence that the default resulted from a

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Fifth Amendment rights have been violated, while when a state defendant makes the same charge, he is in fact complaining (as is this petitioner) of an abridgement of his Fourteenth Amendment rights. See e.g., Washington v. United States, infra. Thus, violation of the Equal Protection Clause of the Fourteenth Amendment is not a defense to a federal prosecution, at least insofar as is relevant here, and hence is not one of the matters that can be waived under Rule 12.

deliberate choice made by counsel and participated in by his client." *Wade v. Yeager*, 377 F.2d 841, 846 (3rd Cir. 1967), certiorari denied 393 U.S. 893 (1968). More specifically, as stated by the United States Supreme Court, "[t]he classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 ... furnishes the controlling standard.... [And] a state court's finding of waiver [does not] bar independent determination of the question by the federal courts on habeas [corpus], for waiver affecting federal rights is a federal question [citation omitted]." *Fay v. Noia*, 372 U.S. 391, 439 (1963). In short, regardless of whatever may be the procedural rule with respect to waiver in the criminal courts of Tennessee and regardless of whatever may be the federal practice in that regard, it is clear that the test for waiver which must be applied by this court in this case is the one expounded by the Supreme Court in the case of *Johnson v. Zerbst*, *supra*. It remains to examine that test in the light of the facts of the case at bar.

Under the holding in *Johnson v. Zerbst*, the "... 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and ... 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, conduct, and experience of the accused." *Johnson*, *supra*, at 464 (citations omitted).

[fol. 12] Viewing this petitioner in the light of his experience and background at the time of his indict-

ment and conviction, it is readily apparent that the presumption against waiver set forth in *Johnson v. Zerbst* works conclusively to preclude a finding of waiver in his case, for there is nothing in the record which rebuts such presumption in any manner. However, petitioner need not place his reliance upon the effect of the presumption alone, for the uncontroverted evidence adduced in this case obviates the need for such reliance: this evidence establishes as a matter of fact that petitioner was unaware of so much as the remotest possibility of attacking his indictment on the ground herein at issue at the time the indictment was returned, at the time of his guilty plea and sentence, or at any other time until shortly before he actually raised the matter in his state habeas corpus petition. Clearly, under the *Johnson v. Zerbst* standard, petitioner cannot be held to have waived something of which he was not even aware.

It might be contended that, since the possibility of attacking an indictment on the ground that it was rendered by a racially-exclusive grand jury has long been available, *Strauder, supra*, petitioner's counsel should be charged with knowledge of such possibility and that such knowledge should, in turn, be imputed to petitioner. Such an argument is clearly not well taken in light of the fact that "[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948...." *Henderson v. Russell, supra*, (Galbreath, Jr., concurring). What is more, petitioner's attorney stated in an affidavit executed in conjunction with petitioner's state court proceeding that, indeed, [fol. 13] the possibility of raising the equal protection objection never occurred to him and that, in consequence, he never mentioned such possibility to

petitioner. Given this latter fact, even if petitioner's counsel had been well aware of the possibility of attacking petitioner's indictment on equal protection grounds, but had, through either choice or negligence, failed to assert such grounds in his client's defense, his failure could not, on the facts of this case, be imputed to petitioner, because "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief." *Fay v. Noia*, *supra*, 439.

In substance, shorn of the extraneous trappings of legal fiction, the outcome of this case turns upon the answer to the following simple question: Can a twenty-year-old black defendant, who had less than a sixth-grade education when he was charged with murder in 1948, be held intentionally to have relinquished or abandoned a known right or privilege by virtue of his failure, without contrary advice of counsel, to assert in his own defense the proposition that his indictment was constitutionally void in the light of the Equal Protection Clause of the Fourteenth Amendment, when, in fact, "[n]o lawyer in this State" would have thought of asserting such a defense? This court holds that he cannot. *Labat v. Bennett*, *supra*; *Ellzey v. Breazeale*, 277 F. Supp. 948 (S.D. Miss. 1967); *Gordon v. Breazeale*, 246 F. Supp. 2 (N.D. Miss. 1965).

It follows that petitioner's indictment and all proceedings based thereupon are void and of no legal effect. In consequence, his present incarceration is repugnant to the Constitution of the United States. It is, accordingly, ORDERED that he be released forthwith from the custody of the respondent.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE